Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

80-549

No.

IN THE

Supreme Court of the United States

October Term, 1980

JACKMAN & COMPANY, DAVID H. JACKMAN, NATIONAL DREDGING, INC., ROYAL BOSKALIS WESTMINSTER N.V., STUYVESANT DREDGING, INC., UNITED STATES CORPORATION COMPANY, UNITED STATES TRUST COMPANY OF NEW YORK, WARBURG PARIBAS BECKER INCORPORATED, and WILLIAMS-McWILLIAMS CO., INC.,

Cross-Petitioners,

—against—

GREAT LAKES INTERNATIONAL, INC.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 6, 1980

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QUESTION PRESENTED

Has plaintiff shown "specific facts" to establish a triable issue regarding the justiciability of the claim and plaintiff's standing to bring it, given:

(a) the numerous speculative contingencies that would have to eventuate during the next two years (many of which are under the control of nonparties, governmental and private) before the theorized threatened "injury in fact" could conceivably occur;

(b) the directive of 33 U.S.C. § 622 that the federal dredger fleet be withdrawn from the market *pro tanto* with the entry of private dredgers such as that involved in this suit; and

(c) the lack of any reasonable basis for predicting that the injunction plaintiff seeks will redress the putative loss that plaintiff theorizes?

PARTIES TO PROCEEDING BELOW

Great Lakes International, Inc., cross-respondent herein, was plaintiff below and is petitioner in *Great Lakes International, Inc. v. Philip M. Klutznick, Secretary of Commerce of the United States of America, et al.*, Dkt. No. 80-366.

Cross-petitioners herein (private defendants below, and among the respondents in No. 80-366) are: Jackman & Company; David H. Jackman (deceased August 29, 1980); National Dredging, Inc.; Royal Boskalis Westminster N.V. (formerly "Royal Bos Kalis Westminster Group N.V."); Stuyvesant Dredging, Inc.; United States Corporation Company; United States Trust Company of New York; Warburg Paribas Becker Incorporated; and Williams-McWilliams Co., Inc.

Government defendants below, respondents in No. 80-366 are: Philip M. Klutznick, Secretary of Commerce of the United States of America; United States Department of Commerce, Maritime Administration; Samuel B. Nemirow, Acting Assistant Secretary of Commerce for Maritime Affairs; and Robert J. Patton, Jr., Secretary of the Maritime Administration.

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—against—

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PRIOR OPINIONS

The order of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, dismissing the complaint for lack of standing, appears as Appendix A to plaintiff's Petition for a Writ of Certiorari in No. 80-366 ("plaintiff's petition"). The transcript of the oral opinion of the district court appears as Appendix B to plaintiff's petition; and the memorandum-endorsed order of the district court appears as the appendix to this cross-petition. None of the foregoing is reported.

JURISDICTION

The order of the court of appeals was dated and entered on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. § 1331(a).

This cross-petition for a writ of certiorari is filed pursuant to SUP. CT. R. 19.5. Plaintiff's petition for certiorari was received by cross-petitioners on September 5, 1980.

STATUTES INVOLVED

The statutes involved in this case are Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280, and the Rivers and Harbors Improvements Act of 1978, 33 U.S.C. §§ 622, 624, both of which are set forth verbatim in Appendix C to plaintiff's petition.

STATEMENT OF THE CASE

The nature of this case, the decisions below and the facts relevant to plaintiff's petition are set forth in the Brief for Private Respondents in Opposition ("brief in opposition") filed herewith in No. 80-366.

The additional facts pertinent to this cross-petition are these:

Defendants' motions for summary judgment, insofar as they contested plaintiff's standing to sue, were based not only on the failure of plaintiff's claim to come within the zone of interests sought to be protected by the statute in question (Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280), but also on the non-justiciability of that claim and plaintiff's inability to show injury in fact.

The district court, in granting defendants' motions on zone-test grounds, assumed *arguendo* that plaintiff could have satisfied Article III's requirement of injury in fact, had the interest plaintiff attempts to prosecute in this suit

been within the zone of interests of the statute in question (plaintiff's petition 5a-6a). The court of appeals did not consider that question (*see* plaintiff's petition 2a-3a).

REASONS FOR GRANTING THE CROSS-PETITION

Plaintiff asserts that the district court's *arguendo* assumption regarding injury in fact represented a determination on the merits (plaintiff's petition 7-8). Cross-petitioners disagree for the reasons stated in their brief in opposition (pp. 19-20 & n. 16), but nevertheless make this cross-petition to preserve their rights in the light of the suggestion of this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24 n. 43 (1979).

If, contrary to our submissions, certiorari is granted to review plaintiff's standing under prudential zone-test limitations, we urge, on the grounds set forth in Point II A. of our brief in opposition and for reasons of judicial economy, that the constitutional requirements of standing be reviewed at the same time.

October 6, 1980

Respectfully submitted,

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APPENDIX

Index No. 79 Civ. 6869 (WK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREAT LAKES INTERNATIONAL, INC.,
Plaintiff,

—against—

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

NOTICE OF CROSS-MOTION
[FOR SUMMARY JUDGMENT]

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3/12/80

Motion granted for lack of standing for reasons stated on the record in open court.

So ordered. March 12, 1980

WHITMAN KNAPP

U. S. D. J.

DISTRICT COURT
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MAR 12 1980
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Cross-Petitioners,

—against—

GREAT LAKES INTERNATIONAL, INC.,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF CROSS-RESPONDENT

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Question Presented

Whether the record as a whole provides a sufficient basis for the constitutional standing requirement of injury in fact, fairly traceable to the challenged agency action, which is redressable by the requested relief.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF CROSS-RESPONDENT

Statement of the Case

This brief is respectfully submitted in opposition to the cross-petition received on October 7, 1980. Cross-petitioners are the private respondents in Case No. 80-366. Cross-respondent respectfully refers the Court to the Statement of the Case in the petition in that case, at 2-8, for the facts and proceedings below. Cross-respondent does not claim that the district court made any finding of fact or conclusion of law on the issue of injury in fact. It does maintain that, based on the record, the district court properly assumed the truth of cross-respondent's allegations of injury. (Pet. at 16-17.)

Summary of Argument

The alleged injury to cross-respondent is not speculative since cross-petitioners intend that the dredge will compete with cross-respondent, and is traceable to agency action, since the government conditionally approved a Title XI loan guarantee on the basis that the dredge would do so successfully. Moreover, the fact that contingencies must occur before injuries result does not make the injury speculative.

Cross-respondent's injury is redressable in this action since the record shows that the relief sought would in all likelihood terminate cross-petitioners' efforts to compete with cross-respondent in the domestic dredging industry.

ARGUMENT

Cross-respondent, plaintiff below, has alleged that the agency action complained of herein will have the direct and immediate result of putting the non-citizens Stuyvesant and Boskalis in competition with petitioner in the domestic dredging industry, specifically in the market of Corps of Engineers' dredging contracts, causing incalculable economic injury to cross-respondent, and has supported its allegations by affidavit. (R.1, complaint, ¶¶ 4, 37, 50; R.3, Lemmerhirt affidavit, ¶ 16). Although cross-petitioners now contend, by way of argument of counsel, that their competition with cross-respondent is "speculative," they specifically identified cross-respondent's vessel, "Manhattan Island," as their principal competition. (Ex. 1 to R.1, National application, at 21-24.) The government conditionally approved National's request for a $30,000,000 guarantee upon finding that the dredge would in fact compete successfully with cross-respondent for Corps of Engineers' con-

tracts. (R.29, Neumann affidavit, Attachment 31, at 8-14.) None of the affidavits submitted by cross-petitioners or the government controverts cross-respondent's allegations of economic injury.

The fact that there are contingencies which must occur before the injury is done does not make that injury speculative. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-262 (1977); *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388, 389 (1st Cir. 1977). Indeed, cross-petitioners claim that such "contingencies" are certain to occur. (Br. Opp. at 22.) Moreover, the fact that the dredge is now under construction gives this controversy the non-speculative character required by Article III, Section 2, of the Constitution. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 100 S.Ct. 800, 806 (1980); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 262-63.

Cross-petitioners' counsel now argue that ". . . no injunction issued in this case would prevent the completion of construction or the eventual operation of this dredger in the domestic coastwise trade. . . ." (Br. Opp. at 22.) No such proposition is supported in the record, which includes moving affidavits submitted to the district court by cross-petitioners, asserting a substantial likelihood that the injunction sought herein would put an end to their project. (R.17, Brown affidavit, ¶ 17; R.19, Waldorf affidavit, ¶ 8; R.18, Brunner affidavit, ¶ 7.) *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978).

Cross-petitioners urge that they might rearrange the participation of parties so as to remove the illegality alleged on the merits. (Br. Opp. at 22.) A mere cosmetic change in the identity of certain parties would not remove

the illegality asserted, and thus would not remove the alleged injury of illegal competition by the non-citizens, Stuyvesant and Boskalis. *Meacham Corp.* v. *United States*, 207 F.2d 535 (4th Cir. 1953), *cert. dismissed*, 348 U.S. 801 (1954). Counsel's argument, that possible action by the cross-petitioners might supplant the interests of the non-citizens with interests of citizens, is outside the record, and contradicted by cross-petitioners' affidavits. (*See, e.g.*, R.17, Brown affidavit, ¶ 17.) In any event, the fact that some voluntary unilateral action by cross-petitioners might provide cross-respondent with all its requested relief (*i.e.*, exclusion of foreign competition from the domestic dredging industry) does not detract from the necessity for such relief by court order until and unless such action be taken.

Based on the record as a whole, it is respectfully submitted that the district court correctly assumed the truth of cross-respondent's allegations of injury in fact, and that that constitutional requirement was no bar to the present action. Any remaining issues with respect thereto may be more properly determined in the district court. The court of appeals did not reach the constitutional standing issue. Cross-respondent respectfully maintains that the only question raised by the disposition in the courts below is their application of the "zone of interests" criterion for standing.

CONCLUSION

The supposed issues raised by the cross-petition are unsupported by the record, are frivolous, and do not deserve the consideration of this Court. The cross-petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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